# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## CRIMINAL APPEAL No. 76 of 1999

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE R.P.DHOLAKIA** : Sd/-

**HONOURABLE MR.JUSTICE KS JHAVERI** : Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**GOVINDBHAI BABUBHAI SIKLIGAR - Appellant(s)**
**Versus**
**STATE OF GUJARAT - Opponent(s)**

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**Appearance :**
MR KJ SHETHNA for Appellant(s) : 1,
MS MS PANCHAL APP for Opponent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA**

**and**

**HONOURABLE MR.JUSTICE KS JHAVERI**

**Date : 04/10/2007**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)**

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 30.11.1998 delivered by the Learned Additional Sessions Judge, Panchmahals at Godhra in Sessions Case No.200 of 1995, whereby he was sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.2,000/-, in default, to undergo one year R.I. for the charge under Section 302 of the Indian Penal Code and also sentenced to undergo three years rigorous imprisonment and fine of Rs.1,000/-, in default, to undergo six months R.I. for the charge under Section 498(A) of the Indian Penal Code. It was also ordered to pay Rs.2,000/- out of the fine amount of Rs.3,000/- to the daughter of the deceased.

2. The case of the prosecution in short is that on 9th June, 1995, when Dr.S.N. Sutariya was on duty as Medical Officer with Godhra Civil Hospital, a lady named Smitaben was brought to Hospital with burn injuries by her husband, Govindbhai and others. Dr.Sutariya asked her history regarding the incident, who in turn, has categorically informed that

while she was boiling the milk, incident took place causing her burn injuries. Dr.Sutariya noted down the same upon the case papers. As it was a medico-legal case, Dr.Sutaria informed the Police Station by way of vardhi, which came to be recorded as Janava Jog Entry No.6/1995 on 09.06.1995. Thereafter, investigation was handed over to P.S.I., Shri Solanki. In pursuance of that, he went to the scene of offence and drew the scene of offence panchnama in the presence of panchas. He also seized the muddamal and recorded the statements of various witnesses and, thereafter, went back to Police Station. At about 11 O'clock, when he realized that he should have gone and seen the victim in the hospital, he went to Hospital, tried to contact her and recorded the complaint, Exh.32, wherein he took left hand thumb impression of the victim. He sent the same into the Police Station for registration of the offence, which came to be registered as Godhra Town Police Station I-C.R.No.135/1995 under Sections 307 and 498(A) of the Indian Penal Code. Further investigation was handed by the P.S.O. to P.S.I, Shri Solanki. As her physical condition was not good, he sent yadi to the Executive Magistrate for the purpose of recording her dying declaration. In pursuance of that, the Executive Magistrate,

Shri Ramchandra Gajanandray Indrapurkar, (P.W.No.15, Exh.42) visited the victim. He took care to see that at the time of recording the dying declaration, nobody remains present. He thereafter recorded her dying declaration, Exh.44. As she was not in a position to sign or put her thumb mark, the Executive Magistrate obtained right leg thumb mark on the dying declaration, Exh.44. Since the physical condition of the victim was deteriorating, the Investigating Officer sent another yadi (Exh.45) to Executive Magistrate for recording the dying declaration of the victim. In pursuance of that, Executive Magistrate, Shri Ramchandra went to the hospital, verified her physical condition and obtained opinion from the doctor concerned as to her fit state of mind in giving the dying declaration. He accordingly recorded the second dying declaration (Exh.46) of the deceased, wherein he took left leg thumb impression of the deceased. During the course of treatment, as the victim succumbed to the injuries, report was submitted for adding Section 302 of the Indian Penal Code. Thereafter, he filled up Maranottar form, drew inquest panchnama in the presence of two panchas and also sent the dead body to concerned doctor for the purpose of postmortem. The postmortem was performed by

the concerned doctor and gave postmortem report, Exh.21. Meanwhile, statements of parents of the victim, brother and other relatives were recorded. As in the FIR as well as in the second dying declaration, the victim has categorically mentioned that she has been killed by her husband i.e. the appellant-accused, Govind by pouring kerosene and igniting her, offence came to be registered against the appellant-accused and he was arrested and sent into judicial custody. Muddamal was sent to FSL with forwarding letter. On receiving the FSL as well as P.M reports, same were kept with investigation file.

3. At the end of investigation, chargesheet came to be submitted before the Court of Learned C.J.M., Godhra. As the offence alleged against the accused was exclusively triable by the Court of Sessions, same was committed to the Court of District & Sessions, Godhra, which came to be numbered as Sessions Case No.200/1995 and transferred into the Court of Learned Additional Sessions Judge, Panchmahals at Godhra.

4. On production of the accused, the learned Additional Sessions Judge framed the charge against the appellant-accused, wherein he pleaded not guilty and claimed to be tried.

5. To prove the case against the appellant-

accused, the prosecution examined as many as 16 witnesses viz., P.W.No.1 viz., Ajaykumar Mangubhai Sinkligar, Exh.8 (brother of the deceased), P.W.No.2 viz., Mangubhai Somabhai Sinkligar, Exh.9 (father of the victim), P.W.No.3 viz., Anandiben Mangubhai Sinkligar, Exh.10 (mother of the victim), P.W.No.4 viz., Mudrikaben Kantilal, Exh.11 (married sister of victim, who is staying in Godhara town and witness of incident), P.W.No.5 viz., Shardaben Amaratlal, Exh.12 (maternal aunt of the victim), P.W.No.6 viz., Namaranbhai Zinabhai Sinkligar, Exh.13 (cousin brother of the father of the deceased), P.W.NO.7 viz., Dr.Subhashchandra Nathalal Sutariya, Exh.17 (Medical Officer, Civil Hospital, Godhara, who treated the victim), P.W.No.8 viz., Dr.Mohil Akbarali Maksud, Exh.20 (the doctor, who has performed the postmortem of the deceased), P.W.No.9 viz., Dariyavarsinh Bhavansinh Solanki, Exh.31 (P.S.I., who investigated the Janava Jog Entry No.6/1995 and also recorded the complaint, Exh.32), P.W.No.10 viz., Subodhbhai Rasiklal Upadhyay, Exh.34 (Panch of scene of offence panchnama), P.W.No.11 viz., Kirankumar Mafatlal Shah (Panch of scene of offence panchnama), P.W.No.12 viz., Rajak Amjan Shaikh, Exh.37 (neighbour, who after the incident reached the scene of offence), P.W.No.13 viz.,

Naravatsinh Vajesinh (P.S.O., who registered the complaint, Exh.32), P.W.No.14 viz., Kalyansinh Laxmansinh (P.S.O., who recorded Janava Jog Entry No.6/1995 and send yadi to Executive Magistrate for recording dying declaration), P.W.No.15 viz., Ramchandra Gajanandray Indrapurkar, Exh.42 (Executive Magistrate, who recorded dying declarations, Exhs.44 & 46) and P.W.No.16 viz., Pradipkumar Mulshankar Bhatt, Exh.50 (Investigating Officer, who after investigation submitted chargesheet before the Court).

6. The prosecution also produced and relied on 24 documents viz., complaint at Exh.32, dying declaration at Exh.44, Janava Jog Entry No.6/1995 at Exh.51, scene of offence panchnama at Exh.33, second dying declaration at Exh.46, inquest panchnama of the deceased at Exh.22, discovery panchnama at Exh.52, yadi wrote for performing postmortem at Exh.24, postmortem report at Exh.21, cause of death certificate at Exh.25, report submitted to Ld. C.J.M. for addition Section 302 of the IPC at Exh.27, yadi wrote for drawing map of scene of offence at Exh.47, letter along with map given to City Survey Superintendent at Exh.48, map of scene of offence at Exh.49, muddmal sent to FSL along with forwarding letter at Exh.53, FSL report along with forwarding letter at Exh.56 and arrest memo

at Exh.58.

7. On submission of the closing purshis by the Learned A.P.P. and after recording the further statement of the accused under Section 313 of the Criminal Procedure Code, the Learned Additional Sessions Judge, Panchmahals at Godhra convicted the appellant-accused for having committed offence punishable under Sections 302 & 498(A) of the Indian Penal Code and, therefore, he accordingly, passed the order of conviction and sentence as stated hereinabove.

8. Being aggrieved by the aforesaid Judgment and Order of conviction and sentence awarded by the trial Court, the appellant-accused has preferred this appeal.

9. We have heard learned counsel, Mr.K.J. Shethna for the appellant-accused and learned Additional Public Prosecutor, Ms.Mita S. Panchal for the State. We have been taken through the record and proceedings by the learned counsel for the respective parties.

10. Learned counsel for the appellant-accused, Mr.Shethna has taken us through the entire documentary evidence and also relevant portion of the judgment delivered by the Court below. He has concentrated his arguments mainly on the ground that the witnesses i.e. the relatives of the victim

are not the witness of incident and their evidence may be taken into considered for the purpose of Section 498(A) of the Indian Penal Code only. It has been argued that as per the evidence of P.W.No.12, Rajak Amjan Shaikh, Exh.37, it cannot be said that the appellant-accused has been involved himself in crime in question. According to him, he is a natural witness and, hence, there is no reason to disbelieve his evidence, more particularly, when he has not been declared hostile by the prosecution.

11. Over and above, he has concentrated his arguments upon evidence of three material evidence i.e. FIR at Exh.32, the dying declaration at Exh.44 and second dying declaration at Exh.46 as well as oral evidence of P.W.No.7, Dr.Subhashchandra Nathalal Sutariya at Exh.17 along with the case papers, Exh.8, P.W.No.9, Dariyavarsinh Bhavansinh Solanki at Exh.31 and P.W.No.15 viz., Ramchandra Gajanandray Indrapurkar at Exh.42 and argued that the above referred three alleged dying declarations i.e. the complaint, Exh.32 and other two dying declarations, Exhs.44 & 46 are not trustworthy, concocted and are not free from doubts. It is argued that on the basis of evidence on record of the above referred witnesses, it is established that the

physical and mental condition of the victim was not just and proper for giving dying declaration. It has been argued that even the first dying declaration (Exh.44) was recorded at about 7:15 a.m. and second dying declaration (Exh.46) was recorded at about 13:55 p.m. and doctor has made endorsement upon both the dying declarations. It is argued on the basis of evidence on record that even Executive Magistrate has categorically mentioned that he took right leg thumb mark upon the dying declaration, Exh.44 and left leg thumb mark upon the dying declaration, Exh.46 as she was totally burnt. After taking us through the evidence of P.S.O. (P.W.No.14 & 39), it has been argued that the P.S.O. took thumb mark of hand of the deceased upon the complaint, Exh.32, which creates doubt in the mind of all concerned that something has been concocted. In this regard, he has taken us through the relevant cross-examination of all the witnesses, more particularly, mother, father and brother of the deceased. It has been categorically mentioned by all the witnesses that after the incident, they reached the scene of offence and contacted a Social Worker, Prabhaben. It has been further argued that there are material contradictions between the complaint and the two dying

declarations. According to him, the dying declaration recorded by the Executive Magistrate early in the morning at 7:15 and prior to that, at about 4:30 a.m., which is the oral dying declaration before the doctor, wherein the victim has categorically stated that the incident took place and she received burn injuries. For the first time, same has been changed after recording the complaint, Exh.32 before the P.S.I., Shri Solanki. It is true that the dying declaration does not require any corroboration, if it is found to be trustworthy and free from doubts. However, in this case, the dying declarations are not free from doubt and it has been proved by the other side that they are concocted, got up and not trustworthy and since there is no other evidence to connect the appellant-accused with the crime in question, it is submitted that the benefit of doubt is required to be given to the appellant-accused.

12. Learned counsel, Mr.Shethna has also placed reliance upon the judgment reported in 2007 AIR SCW 4820 in the case of Mehiboobsab Abbasabi Nadaf V/s. State of Karnataka.

“Evidence Act (1 of 1872), S.32 – Penal Code (45 of 1860), S.300 – Dying declaration – Can be made basis for conviction – But for that consistency in declaration is relevant factor

– Bride burning case – Deceased taking contradictory and inconsistent stand in different dying declarations – Four declarations made – In one incident was attributed to accident – Other two blamed parents-in-law – In fourth act was attributed to husband as well as parents-in-law – Parents-in-law have already been acquitted – In circumstances husband alone cannot be convicted.”

13. Ms.M.S. Panchal, learned Additional Public Prosecutor, who appears on behalf of the respondent-State has taken us through the reasoning part of the learned Additional Sessions Judge. She submitted that no interference is called for as the prosecution has established the case against the appellant-accused beyond reasonable doubt. It is argued that at the time of recording the first dying declaration or history before the doctor, the appellant-accused, who took her to the hospital for treatment, her family members were there in the hospital and, therefore, under the influence and pressure of other family members, she might have given the history of accident, but as soon as her parents came, she regained her consciousness and, therefore, has corrected her version, which is required to be kept in mind and

required to be accepted in toto keeping in mind the age and physical as well as mental condition of the victim, who was having 11 months daughter. Raising the abovesaid contentions, Ms.Panchal has urged that the present appeal deserves to be dismissed.

14. We have gone through the oral as well as documentary evidence and the reasoned judgment delivered by the Court below shown to us by the learned counsel for the respective parties.

15. It is required to be noted that P.W.Nos.1 to 6 are the relatives of the victim. It is true that above referred witnesses have given their evidence qua Section 498(A) of the IPC and same has been proved by the prosecution by way of above referred witnesses including the incident which has taken place soon before the alleged incident i.e. incident of previous night and for which the prosecution has placed reliance upon the evidence of brother of the victim, Ajaykumar Mangubhai Sinkligar (P.W.No.1, Exh.8) and Namsharanbhai Zinabhai Sinkligar (P.W.No.6, Exh.13).

16. In order to prove Section 302 of the IPC, the prosecution has mainly relied upon the history given by the deceased to Dr.Sutariya and in turn, noted down by the doctor upon the case papers, Exh.18. The first dying declaration (Exh.44) has been recorded by the

Executive Magistrate on 09.06.1995 at about 7:55 a.m. From the history written by the doctor on the case papers (Exh.18) and dying declaration (Exh.44), it has been categorically established that the history given by the deceased was regarding accidental death wherein she has not involved either the appellant-accused or any other family members into the crime in question. It is required to be noted that the Executive Magistrate, who has been examined by the prosecution as P.W.No.15, Exh.42 and through whom, the prosecution has tried to prove both dying declarations (Exh.44 & 46) along with the yadi (Exh.43 & 45), has categorically deposed before the Court that at the time of recording both the dying declarations, the victim was conscious, and was mentally and physically fit to give dying declaration and before recording her dying declaration, he has verified her condition and also taken opinion of the of the doctor concerned in writing. In short, whatever has been mentioned by the deceased in the first dying declaration is totally true and at that time, she was in a position to give dying declaration as she was mentally and physically fit for the same.

17. P.W.No.7, Dr.Sutariya has categorically deposed that he has also inquired from the

deceased regarding the history of incident, wherein also, she has categorically mentioned that it is a case of accidental death, wherein she has received burn injuries at the time of boiling milk for her daughter and Dr.Sutariya has noted down the same upon the case papers and it has been proved as Exh.18. It is also required to be noted that the brother of the victim, Ajay and Namsharan Sinkligar reached the hospital earlier in the morning itself. In short, they were in the hospital at the time of recording the first dying declaration (Exh.44) and history given by the deceased to doctor. We are not telling that at the time of recording the dying declaration, they were present with the deceased, but they were in the hospital. The conduct of the Investigating Officer, Shri Solanki also creates doubt in the mind of all concerned including this Court as the way in which the matter has been investigated by the Police is not satisfactory one. He himself has admitted in his evidence that when he came to know regarding the incident, immediately, he went to the scene of offence for preparing the scene of offence panchnama. He has admitted in his evidence that after visiting the scene of offence, he recorded the statement of practically 11 persons and, thereafter, he went back to Police Station.

He has fairly admitted that the victim was severely burnt and admitted in the hospital and though it was an accidental death, he has chosen not to visit the hospital. Instead of that, he went to place of offence and tried to kill time by way of preparing scene of offence panchnama and, thereafter, recorded the statements of various witnesses. It has been established from the evidence on record that some social workers informed the Police and, thereafter, the Police machinery has been put into motion, wherein Shri Solanki went to the Civil Hospital for the first time after 11:00 a.m. The alleged incident took place in the early morning at about 3:30 and Janava Jog entry was recorded at the earliest at 4:30 a.m. So Police has not visited the victim in hospital for a period of seven hours Not only that, when he went to the hospital, he has not taken opinion of the doctor regarding the physical or mental condition of the victim. It is true that the endorsement of the doctor is required as per the settled law. However, the evidence on record shows that various pain killers were given to the deceased. We are not entering into the above aspect of the matter. According to him, he has recorded the FIR given by the deceased (Exh.32) and same has been registered. He has also deposed that at

the bottom portion of FIR, since he was not in a position sign as both the thumb marks was totally burnt, he took right leg thumb mark of the victim. Evidence of Executive Magistrate shows that when he went to the hospital at 6:50 a.m. and recorded the first dying declaration of the deceased, she was not in a position to put her thumb mark of the deceased of both hands as she was severely burnt and, therefore he has taken thumb of right leg of the deceased upon the dying declaration, Exh.44. He has further deposed the same qua second dying declaration, Exh.46 also, wherein as per the say of the P.S.I., Shri Solanki, the deceased was in a position to put thumb mark, which creates doubt in the mind of the Court. We may say that the endorsement of the doctor for the purpose of recording the dying declaration is not required in view of the present law laid down by the Apex Court, but simultaneously, if he is satisfied that the victim was in a position to give dying declaration, but once he adopts the said method and tried to obtain endorsement of the doctor then it is required to be considered. Accordingly, we have also considered the endorsement made upon both the dying declarations, Exh.44 & 46. In both the dying declarations, the doctor has put his

endorsement that the patient was conscious and able to give dying declaration and time has been mentioned as 7:55 p.m. and 13:25 p.m respectively. As per the deposition of the doctor, the first dying declaration (Exh.44) has been recorded at 7:55 a.m. and second dying declaration (Exh.46) has been recorded at 13:55 p.m., which also creates doubt in the mind of the Court regarding the fair and just investigation. It is required to be noted that the first history given by the deceased before Dr.Sutariya has nothing to do either with the prosecution or the appellant-accused. He was there for the purpose of discharging his duty as Medical Officer and recording the history given by the deceased upon the case papers. He has categorically deposed before the Court that at the time of recording the history, the victim was physically and mentally fit for the purpose of giving history and immediately, thereafter, dying declaration, Exh.46 has been recorded by the Executive Magistrate. In both the dying declarations (Exh.44 a& 46) recorded at the earliest, the victim has categorically mentioned that it is a case of accidental death and she received burn injuries while boiling milk for her daughter. This is supported by the evidence of Dr.Sutariya, but whole table turns after 11

O'clock. As we have stated earlier, the act of the P.S.I, Shri Solanki from 8 O'clock to 11 O'clock and onwards is quite different and not satisfactory. The doctor's endorsement also creates doubt in the mind of all concerned. Not only that the Executive Magistrate has categorically deposed before the Court that for recording the second dying declaration, he obtained opinion of the doctor, but in cross-examination, he admitted that second dying declaration (Exh.46) is not in his handwriting, but has been recorded by Shri Pandya. Said fact has been suppressed by him in his oral evidence which also creates doubt. It is also required to be noted that Mr.Pandya has not been examined by the prosecution. We are aware that the dying declaration does not require any corroboration and the person can be convicted only on the basis of dying declaration and law on this point is very settled. Simultaneously, the dying declaration should be free from doubt and trustworthy.

18. We have examined all the above dying declarations from all angles and we believe that the dying declarations given by the deceased are not trustworthy and also not free from doubt. We make it clear at this stage that it so happens in many number of cases that generally when the incident takes

place at maternal home and the persons, who are accompanying the victim in the hospital are the nearest relative of the husband and/or neighbours or husband himself, the first version that will come out by way of history either in the case papers or in any other manner would show a distorted version. However, once parents or persons from the parental side come and she regains consciousness, real truth comes out as to what has happened and when the incident has taken place and the fact of she having minor children and their future comes out in the way of giving dying declaration. Telling real story before all the concerned authority might have happened in this case also and, therefore, we are not giving much weightage to the dying declaration because the prosecution has been able to prove that she has been taken to hospital by her husband. However, we have concentrated on 2nd dying declaration (Exh.46) and FIR (Exh.32) and as we have discussed above, the dying declarations (Exh.44 & 46) are not free from doubt. Therefore, only on that ground, benefit of doubt is required to be given to the appellant-accused qua Section 302 of the IPC.

19. As far as Section 498(A) of the IPC is concerned, we believe that same has been

proved by the prosecution beyond reasonable doubt by way of evidence of various witnesses i.e. P.W.NO.1 to 6 and, therefore, benefit of doubt cannot be given qua Section 498(A) of the IPC.

20. We have also kept in mind the fact that the appellant has already undergone more than 9 years of imprisonment as convict prisoner.

21. The appeal is partly allowed. Judgment and Order of conviction and sentence dated 30.11.1998 delivered by the Learned Additional Sessions Judge, Panchmahals at Godhra in Sessions Case No.200 of 1995 are confirmed qua Section 498(A) of the Indian Penal Code but are quashed and set aside qua Section 302 of the Indian Penal Code. The sentence already undergone by the appellant-accused, Govindbhai Babubhai Sikligar is ordered to be treated as the sufficient sentence imposed on him. The appellant is therefore ordered to be set at liberty forthwith, if not required in any other offence.

*Sd/-* *Sd/-*

***(R.P.DHOLAKIA, J.)*** ***(K.S.JHAVERI, J.)***

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